Supreme Court, U.S.
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No. 00-62

IN THE

Supreme Court of the United States

CSU, L.L.C.,

Petitioner,

v.

XEROX CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Xerox does not dispute that this case presents a conflict among the circuits on an issue of national importance. Instead, Xerox characterizes the Ninth Circuit's resolution of the issue as "aberrant," and urges the Court to disregard its own prior resolution of the issue in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992). *See* Opp. 1, 13-14. Xerox's response boils down to the argument that the Ninth Circuit is wrong on the merits and the Federal Circuit is right. In accordance with this Court's clear statements in *Kodak* and prior cases, CSU believes that the reverse is true. But that is not the point at this stage of the proceedings. The point is instead that there is a clear circuit conflict that this Court should resolve. *See* S. Ct. Rule 10(a).

1. Given the diametrically opposed holdings of the Federal and Ninth Circuits in cases involving the same facts, Xerox does not, and cannot, dispute the existence of a conflict among the circuits. Instead, Xerox dismisses the Ninth Circuit's holding in *Image Technical Services, Inc.* v. *Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), as wrong on the merits. But even if that were true—and it is not—that would do nothing to diminish the need for this Court to resolve the conflict.

Xerox does not dispute that, as a result of the conflict, the Sherman Act will be applied one way in cases subject to the Ninth Circuit's jurisdiction, the opposite way in cases subject to the Federal Circuit's jurisdiction, and potentially two different ways in cases involving both patent and copyright issues. Pet. 12-17. Nor does Xerox dispute that it is impossible for a party to know in advance which rule will apply to its conduct. *Id.* at 16. And Xerox does not seriously contest that the Federal Government's enforcement position is also at odds with the decision below, further increasing the confusion in the law. *Id.* at 17-18.[1] Finally, Xerox provides no indication that the Ninth Circuit is prepared to reconsider its decision. This undisputed conflict clearly warrants certiorari.

Xerox attempts to downplay the direct conflict by asserting that other courts have adopted the Federal Circuit's rule. Even if that were true, the Court would still need to resolve the conflict, but Xerox is wrong in any event. As we have noted (*see* Pet. 14-15), in *Data General Corp.* v. *Grumman*

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[1] It is fanciful for Xerox to assert that the Chairman of the FTC did not criticize the holding of the Federal Circuit. Opp. 18 n.8. The Chairman criticized the Federal Circuit for immunizing refusals to sell or license intellectual property "regardless of the effect of the refusal to deal on competition or the importance of the refusal to deal to protect incentives to innovate," stating that "[t]hat should not be the way these issues are addressed." Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property* (June 15, 2000), <http://www.ftc.gov/speeches/pitofsky/000615speech.htm>.

Systems Support Corp., 36 F.3d 1147, 1187 n.64 (1st Cir. 1994), the First Circuit expressly *rejected* the Federal Circuit's view that any refusal to license valid intellectual property rights is absolutely immunized from antitrust scrutiny.[2] Most of the other decisions cited by Xerox involved a claim—which is not at issue here—that a refusal to license intellectual property unlawfully monopolized the market for the patented or copyrighted item *itself*.[3] And one case did not even consider a Section 2 claim involving a unilateral refusal to deal. *See Service & Training, Inc.* v. *Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992) (pre-*Kodak* case rejecting Section 1 tying claim due to lack of agreement, without reaching Section 2 claim). Thus, the three circuits that have directly addressed the question presented are divided, with the majority rejecting the Federal Circuit's position.

2. In fact, it is the Federal Circuit's absolute immunity position, not the Ninth Circuit's faithful application of traditional antitrust principles, that dramatically departs from precedent. When faced in *Kodak* with an allegation that a monopoly gained through lawful means immunized the kind of refusal to deal at issue here, this Court made clear that a

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[2] Other cases cited by Xerox similarly did not announce an absolute rule. *See United States* v. *Studiengesellschaft Kohle, m.b.H.*, 670 F.2d 1122, 1129 (D.C. Cir. 1981) (rejecting challenge to restrictive license for process patent only because restriction "[did] not in any way operate to limit competition" in associated product); *Advanced Computer Servs. of Mich., Inc.* v. *MAI Sys. Corp.*, 845 F. Supp. 356, 370 n.17 (E.D. Va. 1994) (company did not violate Section 2 by refusing to license diagnostic software to ISO only because it "had a valid reason for taking its actions").

[3] *See Miller Insituform, Inc.* v. *Insituform of North America, Inc.*, 830 F.2d 606 (6th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); *SCM Corp.* v. *Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *W.L. Gore & Assocs., Inc.* v. *Carlisle Corp.*, 529 F.2d 614 (3d Cir. 1976); *Tricom, Inc.* v. *Electronic Data Sys. Corp.*, 902 F. Supp. 741 (E.D. Mich. 1995); *Servicetrends, Inc.* v. *Siemens Med. Sys., Inc.*, 870 F. Supp. 1042 (N.D. Ga. 1994).

party may not use a patent or copyright to " 'exploit[ ] his dominant position in one market to expand his empire into the next.' " *Kodak*, 504 U.S. at 479-480 n.29 (citation omitted). Xerox contends that this statement applies only to concerted "tying" behavior, *see* Opp. 13-14, but it cannot explain why, if that were true, the Court would cite as support *Leitch Manufacturing Co.* v. *Barber Co.*, 302 U.S. 458 (1938), a case involving only *unilateral* conduct.[4] Nor can Xerox explain why its conduct should be immunized if it refuses to sell parts to any company who uses them to compete with Xerox in the service market, but not if it achieves the same result by selling parts only on the condition that the recipient not use them to compete in the service market. And even if Xerox were correct that the Court did not resolve the issue in *Kodak*—and Xerox is wrong—the Court should grant certiorari in this case to eliminate the confusion that now exists on the issue.

Moreover, contrary to Xerox's attempt to portray *Image Technical Services* as involving an "unprecedented inquiry" into "subjective intent," Opp. 7, the court in fact simply applied this Court's settled antitrust jurisprudence, which establishes an *objective* inquiry as to whether a monopolist has a legitimate business justification for a refusal to deal. The Ninth Circuit—following this Court's instructions in *Kodak*—rejected Kodak's intellectual property justification based on the *objective* fact that Kodak had withheld both patented and unpatented parts, confirming that concerns about intellectual property did not explain Kodak's actions. This application of well-settled doctrine was in no way revolu-

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[4] Xerox asserts that *Leitch* should be disregarded because its precise holding has been superseded by statute. *See* Opp. 14-15. But as the Court recognized when it cited that case in *Kodak*, the reasoning of *Leitch* remains valid. *See Image Tech. Servs.*, 125 F.3d at 1216 n.8 ("The particular patent misuse issues addressed in *Leitch* * * * are now controlled by 35 U.S.C. § 271[c], *Dawson Chem. Co.* v. *Rohm & Haas*, 448 U.S. 176 (1980), but this does not alter the application of their reasoning here.").

tionary and applies equally (indeed, even more strongly, *see* Pet. 20-21) to this case.[5]

To the contrary, it is the Federal Circuit's absolute immunity rule that is the dramatic break from precedent. Xerox relies almost entirely on cases stating the unobjectionable—and undisputed—proposition that the owner of intellectual property, like the owner of any property, ordinarily has the right to determine to whom it will sell that property. *See* Opp. 9. But Xerox cites *no* case, other than the decision below, holding that this right is absolute even where the owner's actions are prohibited by the antitrust laws.[6]

3. Xerox also claims that the Federal Circuit "properly recognized" that 35 U.S.C. § 271(d)(4) bars CSU's antitrust claims and misuse defenses. Opp. 15. The Federal Circuit did not embrace such a broad view; rather, it held only that the statute "further supported" the court's absolute immunity rule. Pet. App. 7a. But even if the court had interpreted the

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[5] In its criticism of the Ninth Circuit on the merits, Xerox relies heavily on Prof. Hovenkamp's treatise, but neglects to mention that he served as a consultant to Xerox in this case, and represented Kodak in *Image Technical Services*. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 219 n.2, 220 n.5 (2000 Supplement); Petition for Writ of Certiorari, *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, No. 97-1298 (docketed Feb. 9, 1998).

[6] The language from *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), quoted by Xerox (Opp. 10), simply characterized the decision in *United States* v. *General Electric Co.*, 272 U.S. 476 (1926). *General Electric* did not authorize extension of patent monopolies into other markets but rather recognized only that the antitrust laws permit a patent owner to maintain its lawful monopoly in the patented item itself. *Id.* at 485. Xerox also cites *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32 (1918), for the proposition that a refusal to license is not an antitrust violation. Opp. 10. That case involved restrictive leases later held invalid in *Hanover Shoe, Inc.* v. *United Shoe Machinery Co.*, 392 U.S. 481 (1968). In *Hanover Shoe*, the Court confirmed that its earlier decision had rested on the proposition that the defendant "did not have monopoly power over the market at all." *Id.* at 500. Here, it is conceded that Xerox has monopoly power in the parts market.

statute as Xerox suggests, Xerox concedes that such a holding would directly conflict with the contrary holding of the Ninth Circuit, *see Image Tech. Servs.*, 125 F.3d at 1214 n.7. Opp. 16. Thus, the asserted conflict on this issue only strengthens the case for certiorari.

It should be noted, however, that the Ninth Circuit was plainly correct in interpreting Section 271(d)(4) as not abrogating the Sherman Act in the circumstances of this case. "[E]xemptions from the antitrust laws are strictly construed and strongly disfavored," *Square D Co.* v. *Niagara Frontier Tariff Bur., Inc.*, 476 U.S. 409, 421 (1986), and a statute will not be construed to permit activity prohibited by the antitrust laws unless there is a "clear and certain signal from Congress" rather than "mere inference from ambiguous statutory language." *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 531 (1972).[7] Section 271(d)(4) does not meet this stringent test for antitrust exemption.

Indeed, this 1988 statute does not mention antitrust claims at all, and was expressly intended only to embrace patent misuse defenses. *See* S. Rep. No. 100-492, at 19 (1988) ("The reference to 'illegal extension of the patent right' as well as 'misuse' recognized the differing formulations of activity deemed to be 'misuse' and that misuse is often characterized as illegal extension of the patent right."); *see also Grid Sys. Corp.* v. *Texas Instruments Inc.*, 771 F. Supp. 1033, 1037 n.2 (N.D. Cal. 1991) (holding that "[o]n its face, Section 271(d) relates only to the defense of patent misuse"

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[7] Thus, Xerox is wrong when it contends that any activity nominally permitted by some statute is necessarily exempt from antitrust scrutiny. Opp. 10-11. Implied antitrust immunity requires " 'a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' " *National Gerimedical Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 388 (1981) (citation omitted). No such "clear repugnancy" exists here; intellectual property rights can co-exist with the antitrust laws in the same manner as do other property rights.

and that Congress rejected an "extension of this statute into the area of antitrust").[8]

Moreover, the statute applies only when a patentee has "refused" to license or use "any" rights to the patent, 31 U.S.C. § 271(d)(4)—that is, when the patentee has refused to license or use its patent at all. Far from refusing to license or use any rights to the patents at issue here, Xerox has made extensive use of them, has sold patented parts to non-ISO customers, and even before 1994 sold parts to ISOs for end-use applications. For this reason as well, Section 271(d)(4) has no bearing on this case.

4. Xerox attempts to fashion a separate issue out of CSU's claim that Xerox violated the Sherman Act, and committed patent and copyright misuse, by engaging in exclusionary pricing after 1994. *See* Opp. 24-26. This claim, however, is predicated on the same reasoning as CSU's claim regarding Xerox's refusal to license or sell parts prior to 1994. Thus, both the District Court and the Court of Appeals considered the two claims together, and this Court should do so as well.

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[8] Xerox's citation to legislative history from 1951 (*see* Opp. 17) should have no bearing on the interpretation of an amendment enacted in 1988. But in any event, the snippet of hearing testimony cited by Xerox cannot bear the weight Xerox places on it. While Xerox quotes a statement from a Justice Department official that Section 271(d) "might" affect antitrust law, it neglects to mention the testimony of another Department official that some witnesses had expressed the opposite view. *See Contributory Infringement: Hearings on H.R. 3866 before Subcomm. No. 4 of the House Comm. on the Judiciary*, 81st Cong. 57 (1949) (testimony of John C. Stedman). And the lone citation to an antitrust case by one sponsor of the 1988 amendments, *see* Opp. 17, merely confirms Congress' intent to conform the patent misuse doctrine to the antitrust standard, not (as Xerox would have it) to alter antitrust law. *See, e.g.*, S. Rep. No. 100-492, at 13-14 (explaining Senate version of legislation); 134 Cong. Rec. 32471 (1988) (noting that "[t]he purpose of the legislation has remained the same throughout" the legislative process) (statement of Sen. Leahy).

Xerox notes the obvious proposition that where the antitrust laws do *not* preclude the owner of intellectual property from refusing to sell or license that property, that owner will ordinarily have the concomitant right to charge as much for that property as it wishes. *See* Opp. 25 & n.14. Fair enough. But where, as in *Kodak* and this case, the Sherman Act *does* prevent Xerox from denying access to its parts and software, Xerox cannot achieve the same result through exorbitant pricing.[9] To take an obvious example, if the Sherman Act prevents Xerox from denying CSU necessary copier parts, Xerox could not circumvent that rule by charging CSU $1,000,000 for a part that it sells for $1 to self-servicers or customers who purchase Xerox service. The antitrust laws are not subject to such transparent circumvention. Particularly given that the lower courts rejected CSU's exclusionary pricing claim solely on the basis of their holding that Xerox had an absolute right to refuse to deal, there is no basis for this Court to review one of these claims without the other.

Moreover, contrary to Xerox's contention that courts can never decide what constitutes a reasonable licensing charge (Opp. 26), this Court has made clear that "[m]andatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies." *United States* v. *Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973)

[9] *See Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927) (Kodak's decision to charge retail rather than wholesale prices to dealer that competed with Kodak-owned dealers raised jury question under Section 2); *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 11 F.3d 660, 666-667 (6th Cir. 1993) (under 1992 *Kodak* decision, claim that manufacturer had engaged in discriminatory pricing of diagnostic software must be submitted to jury), *cert. dismissed*, 512 U.S. 1216 (1994); *LaPeyre* v. *FTC*, 366 F.2d 117, 120-121 (5th Cir. 1966) (discriminatory leasing rates violated FTC Act); *American Photocopy Equip. Co.* v. *Rovico, Inc.*, 359 F.2d 745, 747 (7th Cir. 1966) ("[T]he royalty policy of plaintiff is in violation of the antitrust laws of the United States, being exorbitant and oppressive."); *Peelers Co.* v. *Wendt*, 260 F. Supp. 193 (W.D. Wash. 1966) (discriminatory licensing of patents can give rise to antitrust violation).

(citing *Besser Mfg. Co.* v. *United States*, 343 U.S. 444 (1952), *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), and *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945)). These cases likewise belie Xerox's contention that patents are so sacrosanct that the antitrust laws can never compel their license. Thus, because there is a genuine issue of material fact as to whether Xerox engaged in exclusionary pricing after 1994, the Court should reverse the judgment below as to both Xerox's pre-1994 and post-1994 conduct.

5. Finally, Xerox does not deny that the question presented is of national importance. *See* Pet. 26-30; Br. of Amicus Curiae Service Industry Ass'n. To the contrary, Xerox's odd suggestion that the Court should summarily affirm the Federal Circuit, Opp. 1, virtually concedes that this case raises an important issue warranting this Court's attention.

This Court almost never summarily affirms cases within its certiorari jurisdiction without briefing and argument. This case plainly warrants plenary consideration, for the issue affects not only the parties to this case, but the entire economy. All sectors of the modern economy utilize intellectual property in some way, and the Federal Circuit's rule, if allowed to stand, would allow any monopolist improperly to extend its monopoly by refusing access to any item or facility that happens to use patented or copyrighted material. For example, the ski operator in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), could deny access to customers who patronized other resorts if its ski lifts incorporated any patented items. Likewise, the utility in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), could refuse access to its transmission lines if those lines utilized any patented items. And Xerox does not deny that, under the Federal Circuit's rule, a company with a monopoly over a critical software product could refuse to license that product in order to garner an unrelated monopoly. Pet. 28.

A decision with such far-reaching implications plainly warrants plenary review. The decision below squarely conflicts with the decisions of other circuit courts, as well as with this Court's precedents, and involves a question of national importance. The Court's certiorari jurisdiction was intended for precisely such a case.[10]

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the judgment below reversed.

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[10] Having little to say in opposition to certiorari, Xerox attempts to sully CSU with malicious allegations that CSU "built its business" on parts and software "stole[n]" from Xerox. Opp. 2. These allegations are false. The evidence cited by Xerox establishes only that a CSU employee who once worked for Xerox found a single disk in his basement, Ct. App. J.A. 691-692, 758; that Xerox voluntarily provided a disk to another employee, *id.* 650-652; and that CSU ceased doing business with suppliers immediately upon learning that one may have been a Xerox employee, and that another may have possessed unauthorized parts, *id.* 881-882, 850. There is *no* evidence that CSU knew of, or condoned, the use of stolen parts or software. *Id.* 851-852, 854 at 38, 884-885. In fact, Xerox's own private investigator found no evidence that CSU had ever used stolen parts. *Id.* 897 at 61, 898 at 89-90. Finally, any issues regarding service manuals are immaterial because the parties have settled that claim, Pet. App. 15a, and Xerox's other infringement claims remain subject to CSU's valid misuse defenses.